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No. 99-388

In the Supreme Court of the United States

NATIONAL ENGINEERING & CONTRACTING COMPANY, INC., PETITIONER

v.

ALEXIS HERMAN, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals properly declined to consider petitioner's contentions that were not raised before the Commission.

2. Whether the Commission deprived petitioner of due process when it cited petitioner for violation of a safety standard and gave petitioner at least three opportunities to argue that the standard did not apply to it.

3. Whether substantial evidence supported the Commission's finding that petitioner willfully violated a safety standard.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 181 F.3d 715. The decision of the Occupational Safety and Health Review Commission (Pet. App. 18a-40a) is reported at 18 O.S.H. Cas. (BNA) 1076. The decision and order of the administrative law judge (Pet. App. 41a-61a) is unreported.

JURISDICTION

The court of appeals entered its judgment on June 4, 1999. The petition for a writ of certiorari was filed on September 1, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Occupational Safety and Health Act of 1970 (OSH Act or Act), 29 U.S.C. 651 *et seq.*, authorizes the Secretary of Labor to issue citations to employers who have violated a workplace health and safety standard. *Martin* v. *OSHRC*, 499 U.S. 144, 147 (1991); 29 U.S.C. 654(a), 658(a), 659(a), 666(a)-(c). A citation may include abatement orders and civil penalties that range up to $70,000 for each willful or repeated violation, and up to $7000 for each serious or non-serious violation. 29 U.S.C. 666(a)-(c).

If an employer timely contests a citation, the Occupational Safety and Health Review Commission (the Commission) "must afford * * * an evidentiary hearing and 'thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty.'" *Martin*, 499 U.S. at 148 (quoting 29 U.S.C. 659(c)). An aggrieved party may seek judicial review of an adverse Commission order in a court of appeals, which may hear only an objection that was "urged before the Commission," unless the court excuses "the failure or neglect to urge such objection * * * because of extraordinary circumstances." 29 U.S.C. 660(a). In addition, the court of appeals must treat as "conclusive" Commission findings of fact that are "supported by substantial evidence." *Martin*, 499 U.S. at 148; 29 U.S.C. 660(a). The Commission's legal conclusions may be set aside only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A).

2. Petitioner is an Ohio construction company that engages in road work projects. Pet. App. 5a. On August 16, 1994, while petitioner's employees were moving concrete traffic barriers to barricade workers

constructing a sound wall, petitioner's 22-ton Manitex Model 2284 "boom truck" overturned and crushed to death an employee, Lloyd Lee, and seriously injured two other employees. *Ibid.* The boom truck overturned because its crane picked up a barrier from the truck bed with both front outriggers retracted and the two rear stabilizers down but not fully extended. *Id.* at 5a- 6a.[1] The outriggers and stabilizers could have been extended fully if the boom truck had pulled forward ten feet before making the lift. *Id.* at 6a.

The Secretary cited petitioner for a willful violation of 29 C.F.R. 1926.550(b)(2), or, in the alternative, 29 C.F.R. 1926.550(a)(1), for using the boom truck "to lift concrete barriers on the site without the outriggers and stabilizers extended and set as specified by the manufacturer." Pet. App. 29a.[2] The Secretary proposed the maximum penalty for a willful violation, $70,000. *Id.* at 39a.

Before the administrative law judge (ALJ), petitioner asserted as defenses vindictive prosecution and

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[1] When the outriggers and stabilizers are fully extended, they support and level the boom truck, permitting it to lift and deploy heavy loads without tipping. Pet. App. 5a.

[2] Section 1926.550 of 29 C.F.R., entitled "Cranes and derricks," provides, in relevant part:

> (a) *General requirements.* (1) The employer shall comply with the manufacturer's specifications and limitations applicable to the operation of any and all cranes and derricks.
>
> * * * * *
>
> (b) *Crawler, locomotive, and truck cranes* . * * * (2) All crawler, truck, or locomotive cranes in use shall meet the applicable requirements for design, inspection, construction, testing, maintenance and operation as prescribed in the ANSI B30.5-1968, Safety Code for Crawler, Locomotive and Truck Cranes.

unpreventable employee misconduct.[3] Pet. App. 42a, 54a-56a. Petitioner did not contend in four days of hearing or in the pre- and post-hearing pleadings that the regulation for which it was cited, 29 C.F.R. 1926.550, did not apply to its boom truck. The ALJ determined that petitioner had violated Section 1926.550(b)(2). Pet. App. 52a-58a. The ALJ further concluded that, although "it was a close question," petitioner's violation was "serious" but not willful. *Id.* at 58a-59a.

3. The Commission reversed in part. Pet. App. 18a-40a. The Commission observed that petitioner had argued for the first time that 29 C.F.R. 1926.550(b)(2) did not apply to its hydraulic boom truck. Pet. App. 30a. The Commission concluded, however, that the alternative standard cited by the Secretary, 29 C.F.R. 1926.550(a)(1), was "more applicable" and "clearly applies to the cited boom truck." Pet. App. 31a & n.16. The Commission therefore did not reach the issue of whether Section 1926.550(b)(2) also covered petitioner's boom truck. *Ibid.*

The Commission also held that the ALJ erred in reducing the classification of the violation to "serious," and thus assessed the Secretary's proposed penalty of $70,000 for a willful violation. Pet. App. 32a-40a. The Commission observed that "[a] willful violation is one which is committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety." *Id.* at 32a

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[3] Petitioner has since dropped both defenses. It has not asked this Court to review the Sixth Circuit's rejection of its vindictive prosecution defense, and it did not raise the unforeseeable employee misconduct defense before the Commission or the Sixth Circuit following the ALJ's rejection of it. Pet. App. 54a-56a.

(internal quotation marks omitted). The Commission found that the standard was met in this case, because petitioner "failed to comply with * * * the clear command in the manufacturer's manual" that "all outriggers and stabilizers" must be "fully deployed whenever the boom is used" and ignored two similar warnings posted on the boom truck itself. *Id.* at 32a-33a. The Commission also relied on the fact that petitioner had a "policy to perform lifts regardless of whether the outriggers or stabilizers could be extended." *Id.* at 35a.

4. The court of appeals affirmed. Pet. App. 1a-17a. Observing that under 29 U.S.C. 660(a) it may review only objections "urged before the Commission," absent "extraordinary circumstances," the court of appeals declined to consider petitioner's contention that subsection 1926.550(a)(1) did not apply to its boom truck. Pet. App. 8a-10a. The court observed that petitioner "did not challenge the scope or applicability of subsection (a)(1) of Section 1926.550 before the Commission, or even before the ALJ," and was thus "precluded from challenging the applicability of subsection (a)(1) for the first time on appeal." Pet. App. 9a-10a.

The court of appeals also rejected petitioner's argument that, because the Commission's briefing notice had requested argument only on subsection 1926.550(b)(2), the Commission denied it due process in finding a subsection 1926.550(a)(1) violation. The court reasoned that petitioner had been on notice of the Secretary's reliance on subsection 1926.550(a)(1) "[f]rom the inception of the administrative process"; that petitioner had "ample opportunity" to raise any defenses to that subsection during the four-day ALJ hearing; and that, upon receipt of the ALJ's decision, petitioner could have raised any issue to the Commission, include-

ing a defense based on the applicability of subsection 1926.550(a)(1). Pet. App. 10a-11a.

The court of appeals also concluded that substantial evidence supported the Commission's finding that petitioner willfully violated Section 1926.550(a)(1). The court observed that "a willful violation is action 'taken knowledgeably by one subject to the statutory provisions in disregard of the action's legality,'" or action "where the employer is 'conscious' of the requirements of a rule and 'nonetheless . . . consciously continues' in its contrary practice." Pet. App. 11a-12a (quoting *Empire-Detroit Steel Div., Detroit Steel Corp.* v. *OSHRC*, 579 F.2d 378, 383 (6th Cir. 1978), and *Donovan* v. *Capital City Excavating Co.*, 712 F.2d 1008, 1010 (6th Cir. 1983)). The court of appeals concluded that, under that standard, the Commission's willfulness finding was supported by evidence that petitioner knowingly engaged in a practice of improperly operating the crane despite the fact that the crane's manual and two warnings posted on the crane itself prohibited operation of the crane without the outriggers and stabilizers fully extended. *Id.* at 12a-14a.

ARGUMENT

The court of appeals' decision is correct and consistent with the decisions of this Court and other courts of appeals. Further review is not warranted.

1. Petitioner asserts (Pet. 7-14) that the Commission violated its due process rights when it upheld the Secretary's citation under subsection 1926.550(a)(1) without giving petitioner an opportunity to address that subsection. Petitioner similarly contends (Pet. 7-14) that the court of appeals misapplied 29 U.S.C. 660(a) by faulting petitioner for failing to address subsection 1926.550(a)(1) before the Commission. Those conten-

tions lack merit and do not warrant further review by this Court.

Section 11(a) of the Act, 29 U.S.C. 660(a), provides:

> No objection that has not been urged before the Commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.

That provision creates a jurisdictional bar to judicial consideration of issues not presented to the Commission absent extraordinary circumstances.[4] This Court has reached the same conclusion with respect to other federal labor provisions containing virtually identical language. See *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982) (29 U.S.C. 160(e) deprives courts of appeals of jurisdiction to hear issue not raised before National Labor Relations Board); *EEOC* v. *FLRA*, 476 U.S. 19, 23 (1986) (courts of appeals under 5 U.S.C. 7123(c) lack "jurisdiction to

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[4] See, *e.g.*, *Globe Contractors, Inc.* v. *Herman*, 132 F.3d 367, 370 (7th Cir. 1997) (under Section 660(a), "review by the Commission is a prerequisite to review by this court"); *D.A. Collins Constr. Co.* v. *Secretary of Labor*, 117 F.3d 691, 694 (2d Cir. 1997) (under Section 660(a), alleged error regarding Secretary's prima facie case is waived in court of appeals by the employer's failure to raise issue in petition for review to Commission); *P. Gioioso & Sons, Inc.* v. *OSHRC*, 115 F.3d 100, 107 (1st Cir. 1997) (to preserve issue for judicial review, aggrieved party must raise it before administrtive law judge, articulate it in petition for review to Commission and offer "modicum of developed argumentation in support of it"); *Durez Div. of Occidental Chem. Corp.* v. *OSHA*, 906 F.2d 1, 5 (D.C. Cir. 1990) (declining to consider issue noted, but not discussed, in petition for review to Commission).

consider" issue not raised before the FLRA absent extraordinary circumstances).[5]

The court of appeals here properly determined that no "extraordinary circumstances" excused petitioner's failure to raise before either the ALJ or the Commission any question concerning the applicability of subsection 1926.550(a)(1) to its crane on its boom truck. Pet. App. 8a-10a. Petitioner concedes that it did not contest subsection 1926.550(a)(1)'s application to its boom truck before the ALJ. Pet. App. 3-4. Contrary to petitioner's contention (Pet. 7-8), petitioner likewise did not raise the subsection (a)(1) coverage issue before the Commission. Petitioner's brief to the Commission discussed the applicability of subsection 1926.550(b)(2), not subsection 1926.550(a)(1). See Pet. Comm'n Br. 36-42. Moreover, petitioner's suggestion (Pet. 6-7) that it raised the applicability of subsection 1926.550(a)(1) by citing Commission precedent pertaining to Section 1926.550 generally, even if true, is insufficient to notify the Commission of the substance of its objection. See *P. Gioioso & Sons, Inc.*, 115 F.3d at 107; *Durez Div. of Occidental Chem. Corp.*, 906 F.2d at 5. In any event, the question of whether petitioner raised the subsection 1926.550(a)(1) issue before the Commission is necessarily bound to the particular facts of this case and does not warrant the Court's further review.

Petitioner argues (Pet. 7-12) that, to the extent that it did not contest coverage under subsection 1926.550(a)(1), its failure was due to the Commission's

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[5] The relevant text of 5 U.S.C. 7123 and 29 U.S.C. 160(e) provides that "[n]o objection that has not been urged before [the agency] * * * shall be considered by the court, unless the failure or neglect to urge [such] objection [shall be] excused because of extraordinary circumstances."

alleged violation of its due process rights by issuing a briefing order which referenced only the ALJ's decision under subsection 1926.550(b)(2). That is not correct.

The Secretary's citation, which commenced this litigation, clearly notified petitioner that subsection 1926.550(a)(1) was an alternative basis for liability. Pet. App. 2a-3a, 10a, 28a-29a, 53a. Petitioner then had three separate opportunities before the agency to contest the applicability of subsection (a)(1). It could have raised the defense during the four-day hearing before the ALJ, *id.* at 10a-11a; it could have petitioned the Commission to review the (a)(1) coverage issue after receiving the ALJ's decision; and it could have moved for reconsideration after receiving the Commission's decision.[6] At no time, however, did petitioner contest the

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[6] Although no Commission rule expressly provides for a motion for reconsideration, the right to file one is fairly implicit in the Act. 29 U.S.C. 661(g) (Federal Rules of Civil Procedure govern Commission proceedings in the absence of contrary rule); Fed. R. Civ. P. 59(e); cf. *Marshall* v. *Monroe & Sons, Inc.*, 615 F.2d 1156 (6th Cir. 1980) (Commission may grant relief from final orders under Fed. R. Civ. P. 60(b)); *Brennan* v. *OSHRC*, 502 F.2d 30, 32 (5th Cir. 1974) (Commission order goes through 30-day review period during which Commission may reconsider). The Commission in the past has considered a motion for reconsideration. See, *e.g.*, *Secretary of Labor* v. *George A. Hormel & Co.*, 2 O.S.H. Cas. (BNA) 1282 (1974); *Secretary of Labor* v. *Safeway Stores, Inc.*, 3 O.S.H. Cas. (BNA) 1123 (1975). Indeed, a party's failure to move for reconsideration of a *sua sponte* ruling by the National Labor Relations Board under 29 U.S.C. 160(e) may bar the party from raising its objection to the ruling on appellate review. *International Ladies' Garment Workers' Union* v. *Quality Manufacturing Co.*, 420 U.S. 276, 281 n.3 (1974) (refusing to address party's procedural due process contention where party failed to move for reconsideration of decision that turned on issue not charged or litigated); *Woelke*, 456 U.S. at 665-666 (finding court of appeals lacked jurisdiction to hear objections to *sua sponte* Board findings where

applicability of subsection 1926.550(a)(1) before the agency. Pet. App. 8a-10a. Under those circumstances, petitioner has no basis for contending that it lacked notice and a "meaningful opportunity to be heard." *LaChance* v. *Erikson*, 522 U.S. 262, 266 (1998).

2. On the merits, petitioner contends (Pet. 14-19) that the courts of appeals disagree over the legal standard for "willfulness" under the Act and that the court of appeals in this case applied an incorrect standard of review in evaluating the Commission's reversal of the ALJ's willfulness determination. Neither argument has merit.

a. Although the Act does not define the term "willful violation," for which civil penalties may be imposed, 29 U.S.C. 666(a), the courts of appeals are consistent in their interpretation. "[C]ourts have unanimously held that a willful violation * * * constitutes 'an act done voluntarily with either an intentional disregard of, or plain indifference to, the Act's requirements.'" *Ensign-Bickford Co.* v. *OSHRC*, 717 F.2d 1419, 1422 (D.C. Cir. 1983) (citations omitted).[7] Since *Ensign-Bickford*, that standard continues to be applied by the courts of appeals. See *Caterpillar, Inc.* v. *OSHRC*, 122 F.3d 437, 440 (7th Cir. 1997); *Valdak Corp.* v. *OSHRC*, 73 F.3d 1466, 1469 (8th Cir. 1996); *Conie Constr., Inc.* v. *Reich*, 73 F.3d 382, 384 (D.C. Cir. 1995); *Reich* v. *Trinity Indus., Inc.*, 16 F.3d 1149, 1155 (11th Cir. 1994); *Brock*

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party failed to move for reconsideration by Board); *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301, 312 n.10 (1978) (rejecting company's justification for not raising objection to Board on ground that it had "no practical reason" to challenge portion of administrative law judge decision adopting company's suggestion).

[7] In a dissenting opinion, then-judge Scalia concurred in the court's legal analysis, but disagreed with its evaluation of the record evidence. 717 F.2d at 1423.

v. *Morello Bros. Constr.*, 809 F.2d 161, 164 (1st Cir. 1987) (Breyer, J.).[8]

Contrary to petitioner's contention (Pet. 16-19), the decision below did not adopt a different definition of "wilful violation." Although the court of appeals recited the standard in slightly different terms, its articulation is not substantively different from the approach taken by the other courts of appeals. Pet. App. 11a-12a ("[A] willful violation is action 'taken knowledgeably by one subject to the statutory provisions in disregard of the action's legality.'" (quoting *Empire-Detroit Steel Div., Detroit Steel Corp.* v. *OSHRC*, 579 F.2d 378, 383 (6th Cir. 1978))). Indeed, its earlier decision in *Empire-Detroit Steel* specifically indicated its agreement with the willfulness standard adopted by the First, Fourth, and Tenth Circuits. See 579 F.2d at 385; see also *Ensign-Bickford Co.*, 717 F.2d at 1422 (including *Empire-Detroit Steel* in list of courts that have agreed on standard); *Cedar Constr. Co.* v. *OSHRC*, 587 F.2d 1303, 1305 (D.C. Cir. 1978) (noting *Empire- Detroit's* "similar approach[]"). Certainly, a slight difference in verbiage does not create a conflict warranting this Court's review. See *Babcock & Wilcox Co.* v. *OSHRC*, 622 F.2d 1160, 1168 (3d Cir. 1980) (noting uniformity in approaches and commenting that "[i]t is not unusual that different words are used to describe the same basic

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[8] The courts of appeals' view comports with this Court's interpretation of the phrase in other contexts. See *McLaughlin* v. *Richland Shoe Co.*, 486 U.S. 128, 133 (1988) (willful violation of Fair Labor Standards Act occurs when "employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute"); *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 128-129 (1985) (violation of ADEA is willful if employer knew or showed reckless disregard with respect to whether ADEA prohibited its conduct).

concept. Our literature would indeed be sterile if that were not the case.").

b. Equally without merit is petitioner's contention (Pet. 15-16) that the Commission improperly reversed the ALJ's credibility findings in concluding that petitioner acted willfully. On this score, petitioner simply misreads the record.

In finding that petitioner had not acted willfully, the ALJ reasoned that the ANSI safety standard under subsection 1926.550(b)(2) "does not mandate that outriggers be used for every lift, [but] only that they be used 'when the load to be handled at that particular radius exceeds the rated load without outriggers as given by the manufacturer for that crane.'" Pet. App. 58a-59a. The Commission found, however, that the ALJ erred in that analysis by failing to recognize that, given the manufacturer's clear prohibition on operating the crane with the four supports partially or fully retracted, "any use of the boom truck without all the outriggers extended would 'exceed the rated load' for the crane" under the ANSI standard in subsection 1926.550(b)(2). *Id.* at 34a. Accordingly, the Commission did not improperly reject credibility findings of the ALJ, but rather drew different inferences than did the ALJ, based on its review of the entire record and its conclusion that the ALJ employed an incorrect legal analysis of the ANSI standard as applied to this case.[9]

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[9] Contrary to petitioner's contention (Pet. 15, 18), the ALJ did not find that petitioner made "good faith" attempts at compliance. Rather, in assessing the amount of the penalty, the ALJ stated that "[t]he record does not indicate any bad faith on the part of the company." Pet. App. 59a; cf. *id.* at 58a ("It is a close question whether [petitioner] committed a willful violation of [subsection] 1926.550(b)(2). * * * It was only because of [petitioner's] past practice of making lifts without all of the outriggers extended that

The Commission thus acted within its authority under 29 U.S.C. 659(c) and 661(j) to reverse or modify the decision of an ALJ. See also *Astra Pharm. Prods., Inc.* v. *OSHRC*, 681 F.2d 69, 74 (1st Cir. 1982) (Commission disagreement with ALJ turned on inference to be drawn from available record, not ALJ credibility findings); *W.F. Bolin Co.* v. *NLRB*, 70 F.3d 863, 872-873 (6th Cir. 1995) (Board did not contradict ALJ on witness credibility but drew different conclusion from underlying facts). Furthermore, the Commission clearly explained the basis for its rejection of the ALJ's conclusion, Pet. App. 34a, and the court of appeals properly accepted that explanation. *Id.* at 12a.

In any event, the court of appeals relied on more than ample evidence to support the Commissioner's finding of willfulness. As the court of appeals observed, the boom truck's operator's manual and two warnings posted on the crane warned against using the crane without full deployment of the outriggers and stabilizers; petitioner acknowledged the necessity of operating the outriggers and stabilizers in place; and despite that knowledge, petitioner had a practice of operating the crane in tight spaces without the outriggers and stabilizers fully deployed. Pet. App. 12a-13a. Under these circumstances, the court of appeals correctly applied the substantial evidence standard and certainly did not misapprehend or grossly misapply the standard so as to warrant this Court's intervention. *American Textile Mfrs. Inst., Inc.* v. *Donovan*, 452 U.S. 490, 523 (1981).

[the crane operator] attempted the lift that resulted in the fatality.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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